APPEAL NO. 93175

On February 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues at the contested case hearing were: first, whether the appellant (claimant) had reached maximum medical improvement (MMI), and second, whether the claimant could be ordered to attend a medical examination more than seventy-five miles from her home.

The hearing officer found that claimant had reached MMI on December 8, 1993, with a zero percent whole body impairment, based upon the findings of Dr. H, a designated doctor selected by the Texas Workers' Compensation Commission (Commission). In regard to the second issue, the hearing officer found that claimant could not be ordered to attend a medical examination at a location more than seventy-five miles from her residence.

The claimant only appeals the hearing officer's finding of MMI and does so upon three grounds. First, claimant submits that the great weight of the medical evidence is contrary to the finding of the designated doctor that claimant has reached MMI. Second, claimant alleges that there is no evidence that claimant has reached MMI from the psychiatric problems caused by her injury. Finally, claimant contends that she was denied her right to due process of law by lack of an opportunity to cross-examine the designated doctor at the contested case hearing.

The respondent (carrier) replies that the hearing officer's finding of MMI should not be disturbed on appeal and that claimant was not denied due process of law. The carrier also requests, in its response to claimant's appeal, that the hearing officer's ruling that the claimant cannot be ordered to attend a required medical examination more than seventy-five miles from her home be overturned.

DECISION

After reviewing the record, we affirm the determinations of the hearing officer.

Claimant alleges an accidental injury in (date of injury), while working for (employer) at a Fina refinery. Claimant asserts an injury resulting from exposure to hydrogen sulfide gas.

Claimant testified that since the injury, she has had problems with her voice. Claimant's testimony and medical records admitted into evidence also show that in addition to speech difficulties, the claimant had complaints of lung and breathing abnormalities. Claimant also reported symptoms of sleep disturbance, agitation, fearfulness, low energy, difficulty concentrating and frequent tearfulness.

Prior to the contested case hearing, the claimant had seen a number of doctors. She had been treated by a Dr. (Dr. W), who had released her to return to work on August 26, 1991. She had been evaluated at the Clinic by a (Dr. I), who found she had hyperemic

and edematous vocal chords and who recommended a chemical detoxification be done. She had been examined by a (Dr. A) of the (clinic) who felt claimant had a normal pulmonary study and could make no definite findings suggestive of pulmonary impairment. She had seen (Dr. S), a Houston otolaryngologist, who conducted a videostroboscopic evaluation in March 1992, found small vocal chord nodules, diagnosed the claimant as having a conversion reaction with hysterical aphonia, and referred her to (Dr. M), a Houston psychiatrist. She had also been referred by Dr. I to (Dr. R), an associate professor of neurology at the (medicine) . Dr. R could find no neurologic reason for the claimant's speech symptoms and found that claimant had reached MMI.

The Commission selected (Dr. H) of Beaumont to be the designated doctor in this case, and he examined claimant on December 8, 1992. Dr. H stated that he could find no physiological evidence for the claimant's voice problems and on a TWCC-Form 69 found that she had reached maximum medical improvement on December 8, 1992, with a zero percent impairment rating.

At the contested case hearing the claimant called (Ms. B), a speech pathologist, as an expert witness. Ms. B testified that she first examined claimant on December 16, 1992. Ms. B stated that because of claimant's respiratory difficulty during a second visit, Ms. B requested additional testing be performed. Ms. B was present when this testing, a videostroboscopy, was performed on January 20, 1993 by Dr. S.

Ms. B further testified that claimant has hyperfunctional voice disorder, which has caused her vocal chords to become so swollen that they are unable to close. This condition results in air blockage leading to a strangled voice. Ms. B also stated that claimant's vocal chords had improved over the past year and that claimant would benefit from additional speech therapy. There was also testimony from Ms. B that in order to properly examine claimant's larynx, Dr. H would have had to physically manipulate it externally, and would also have had to visualize it either by means of a mirror or otherwise.

The claimant, (Ms. W), also testified at the contested case hearing. The claimant testified that when she attended her designated doctor examination with Dr. H, the nurse took her weight and blood pressure, and Dr. H looked at her medical records, and then used a stethoscope to listen to her chest and back through her clothes. The claimant stated that Dr. H did not look inside her throat, or touch her in any way.

Dr. M, a Houston psychiatrist, testified through a deposition by written questions, dated January 29, 1993. Dr. M testified that claimant suffered some psychiatric injury as result of her exposure to toxic gases while working for employer. Dr. M stated that such psychiatric injury included major depression episodes marked by sleep disturbances, agitation, decreased concentration, decreased energy, lowered and altered self image, and at times intense suicidal ideas and fears. Dr. M testified that the claimant had not reached

maximum medical improvement from these psychiatric injuries.

Article 8308-4.25(b) provides that the report of the designated doctor shall have presumptive weight, and that the Commission shall base its MMI determination on that report unless the great weight of the other medical evidence is to the contrary. Claimant's first ground of appeal is that the great weight of the medical evidence is contrary to the finding of the designated doctor that claimant has reached MMI. To reach this conclusion claimant suggests we totally disregard the opinion of the designated doctor. Claimant submits that we may do so because the failure of the designated doctor to examine the claimant's throat or vocal chords means that there was no examination by the designated doctor as envisioned by Article 8308-4.25.

Article 8308-6.34(e) provides that the contested case hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to the given the evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided August 3, 1992; Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. When reviewing a hearing officer's decision for factual sufficiency of the evidence, we must consider and weigh all the evidence, and we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993; Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Nor are we persuaded that the opinion of the designated doctor should be excluded. It is the duty of the trier of fact to determine the weight to be given to the evidence of the inadequacy of a medical examination as with all other evidence. We do not find the hearing officer's decision in this regard against the great weight and preponderance of the evidence. Even though the claimant testified that she was not physically examined, this in itself is insufficient to establish the inadequacy of the examination. *See* Texas Workers' Compensation Commission Appeal No. 92255, decided November 12, 1992.

Ms. B, a speech pathologist, testified that to properly examine the claimant's larynx, Dr. H would have had to manipulate it externally as well as visualize it by the means of a mirror or otherwise. The rule that it is the province of the hearing officer to judge the credibility of witnesses, assign the weight to be given to their testimony, and to resolve conflicts and inconsistencies in the evidence applies to the testimony of expert witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 289-290 (Tex. App.-Houston [14 Dist.] 1984, no writ). In the present case, in light of the statutory presumption to be given the designated doctor's findings under Article 8308-4.25, and considering the evidence that at the time of his examination the designated doctor had the written reports of several other doctors reflecting both their physical examinations and testing of the claimant (some of which testing included the photographing of her vocal chords), we cannot say that

the hearing officer's refusal to find his examination inadequate was against the great weight and preponderance of the evidence.

Claimant's second ground of appeal is that there was no evidence that the claimant had reached MMI from the psychiatric problems caused by her injury. Claimant argues that the report of Dr. H is completely silent as to claimant's psychiatric injuries, and the report concludes stating: "I see no physiological evidence for her problem." The hearing officer stated that since it was clear that Dr. H was provided with some of claimant's psychiatric records, and there is no evidence that Dr. H did not consider these records, the fact that Dr. H chose not to specifically mention claimant's psychiatric symptoms should not be construed to adversely affect the validity of Dr. H opinion. Claimant attacks the rationale of the hearing officer in this regard as being a mere surmise and not evidence.

We find the fact that Dr. H had some of psychiatric records, which is undisputed, and the fact that he also had the records of claimant's other physicians, which include diagnoses such as "conversion reaction" and "hysterical aphonia," to be some evidence that he was aware of and considered claimant's psychiatric condition. It is this evidence which distinguishes this case from Texas Workers' Compensation Commission Appeal No. 92452, decided October 5, 1992, wherein we reversed and remanded the decision of the hearing officer that MMI had been reached when such finding was based upon the opinion of a doctor who was treating claimant for his back injury, and there was no evidence that the doctor was aware of and considered claimant's psychological injury.

In the present case, we do not believe that the mere use of the term "physiological" by the designated doctor, or his failure to specifically discuss the psychiatric diagnoses in his report, is in itself evidence that he failed to consider the medical records before him. We are constrained to point out that if claimant wished to establish whether or not Dr. H considered her psychiatric condition in determining MMI, she could have requested to take Dr. H's deposition by written question, and have asked him.

The claimant's final ground of appeal is that she was denied her right to due process of law by her lack of opportunity to cross-examine the designated doctor at the contested case hearing. Claimant alleges this violation of due process took place when Dr. H's unsworn report was the basis of finding claimant had reached MMI and "claimant was not afforded an opportunity to cross examine Dr. H."

This contention ignores the fact that rules of the Texas Workers' Compensation Commission provide means by which claimant could have examined Dr. H in an effort to impeach or clarify his opinions. Rule 142.12 permits a party to request a subpoena to compel the appearance of a witness at a contested case hearing. In addition, Rule 142.13 permits the taking of a deposition (on written questions to a health care provider) of a witness. The hearing officer clearly established in the record at the contested case hearing

that the claimant and her attorney did not afford themselves the opportunity to examine Dr. H as provided by the rules of the Texas Workers' Compensation Commission. An opportunity foregone is not an opportunity denied. Further, we have previously held that the Appeals Panel, an administrative body, does not decide questions of constitutionality. *See* Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992.

Claimant's contention that it was the burden of any party desiring to introduce Dr. H's report to produce Dr. H for cross-examination fails to appreciate the rules of evidence under which a contested case hearing is conducted. *See* Article 8308-6.34(e) providing that conformity to the legal rules of evidence is not necessary. Further, the rule for which claimant argues would require any party desiring to introduce medical records be required to produce the medical service provider at the contested case hearing. This would render the entire contested case system unworkable.

Finally, we look at respondent's request that we overturn the hearing officer's ruling that the claimant cannot be ordered to attend a required medical examination more than seventy-five miles from her home. This issue is first raised in the response to claimant's appeal. This response was filed 29 days after the hearing officer's decision was mailed to the parties, and therefore appeal of this issue is untimely and we lack jurisdiction to even consider it. *See* Article 8308-6.41(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3); Texas Workers' Compensation Commission Appeal No. 92141, decided May 21, 1992.

For the foregoing reasons, we affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge